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No. 80-2130

In The

Supreme Court of the United States

October Term, 1980

JAMES EARL SHARPE,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS J. MILLER
Attorney General of Iowa

Hoover State Office Building
Des Moines, Iowa 50319

THOMAS D. McGRANE
Assistant Attorney General

Attorneys for Respondent

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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FORM STATEMENT

The requirements of Supreme Court Rule 34.1(a), (b), (d), (e) and (f) and the statement of the case are omitted as permitted by Supreme Court Rule 34.2.

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Iowa Supreme Court ruled that the erroneous submission of first-degree murder to the jury was not reversible error "in the absence of some showing of prejudice." *State v. Sharpe*, 304 N. W. 2d 220, 225 (Iowa 1981). Petitioner was convicted of second-degree murder and asserts the submission of the higher offense denied him due process of law. He posits this on the theory that the jury could not be trusted to follow the instructions and may have arrived at a compromise verdict. His theory is further that the submission of the higher offense allowed the compromise verdict to be higher than it would have been absent the erroneous submission.

Respondent urges there is no reason for this Court to grant certiorari review in the instant case. The review by the Iowa Supreme Court met the requirements of due process by reviewing for prejudice. Reversible constitutional error on an instruction in a state court can be found only "if the ailing instruction by itself so infected the entire trial that the resulting conviction denies due process." *Henderson v. Kibbe*, 431 U. S. 145, 154, 97 S. Ct. 1730, 52 L. Ed. 2d 203, 212 (1977), citing *Cupp v. Naughten*, 414 U. S. 141, 147, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973). The Iowa Supreme Court reviewed the record and found no prejudice. The evidence clearly supported the conviction for second-degree murder. *See Jackson v. Virginia*, 443 U. S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

The issue does not present a novel question of constitutional law. The analysis is little different than that required for the well recognized "concurrent sentence doc-

trine" of *Hirabayashi v. United States*, 320 U. S. 81, 105, 63 S. Ct. 1375, 87 L. Ed. 1775, 1788 (1943); *United States v. Tyler*, 466 F. 2d 920 (9th Cir. 1972), *cert. denied* 409 U. S. 1045, 93 S. Ct. 544, 34 L. Ed. 2d 497 (1972); *United States v. Lee*, 454 F. 2d 190 (9th Cir. 1972); *United States v. Bowdach*, 501 F. 2d 220, 228 (5th Cir. 1974), reh. denied. The concurrent sentence doctrine holds that where a defendant is convicted of two counts in one trial and is given concurrent sentences, if either conviction can be affirmed the other need not even be reviewed. The Petitioner's rationale would require a new trial if either conviction was infirm on the possibility that the jury was more likely to have convicted on the second after they had convicted on the first, albeit the first was improper. *See Fuller v. United States*, 407 F. 2d 1199, 1252 n. 50 (D. C. Cir. 1967), reh. en banc (1968), *cert. denied* 393 U. S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125 (1969). Such a rationale should be applied only if the defendant can show prejudice or at least the probability of prejudice.

In a similar case the Court of Appeals for the District of Columbia stated:

> "Appellant's second hypothesis of prejudice—that the instruction on first degree murder may have unduly influenced the verdict in the second-degree—gives the jury far less credit than it deserves. We see, and appellant offers, no theory upon which to base a realistic conclusion that the jury might have compromised its views because of, or was confused and mislead by, the mere submission of the first degree charge for its consideration."

Howard v. United States, 389 F. 2d 287 (D. C. Cir. 1967), reh. denied (1968). In a more recent case the same circuit found reversible error where murder was submitted

and the court after having "read the record with care" could find "no justification" for such a submission. *United States v. Millen*, 594 F. 2d 1085, 1087 (D. C. Cir. 1979), amended and reh. denied.

In a separate line of cases where the higher offense was submitted on a retrial after a conviction for the lesser offense, courts still looked to prejudice but with a lower standard. The Second Circuit in *United States ex rel. Hetenyi v. Wilkins*, 348 F. 2d 844 (2d Cir. 1965), *cert. denied Mancusi v. Hetenyi*, 383 U. S. 913, 86 S. Ct. 896, 15 L. Ed. 2d 667 (1966) reversed a conviction on a similar challenge on similar grounds finding there was a reasonable possibility of prejudice. 348 F. 2d at 865-66. In that case the charge of first-degree murder was itself a constitutional violation. The distinction between that case and those such as the instant one were noted when the Court stated:

> "We are not suggesting that whenever the range of the prosecution is improperly broad or a greater charge is improperly submitted to the jury the trial is rendered constitutionally inadequate."

Id. 348 F. 2d at 866.

The issue is not novel and the Iowa Supreme Court ruling that reversal is required only if prejudice is shown is in accord with the federal cases. The Iowa Court held only that no "prejudice will be presumed," where the higher charge is given.

The Petitioner's reliance on *Beck v. Alabama*, 447 U. S. —, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980); *Keeble v. Florida*, 412 U. S. 205, 36 L. Ed. 2d 844, 93 S. Ct. 1993 (1973). Those cases simply require that lesser included

offenses be put before the jury. The rationale is that the jury is likely to convict of something where it is clear a defendant has committed some crime, and if a lesser included offense is not offered, a jury may well convict of a higher offense even if all elements are not proven rather than set him free. This rationale does not apply where there are alternatives offered. The choice is not to acquit or convict, but rather to decide which charge the evidence proves. While there is a possibility the jury may compromise higher, this is nothing like the probability present in *Beck* and *Keeble.*

Petitioner has shown no circumstances which would justify the grant of certiorari review. The test of whether there was prejudice in a circumstance where the presenting of the other charge is not a constitutional violation is the one used most often. Also Petitioner has not shown any particular indication of prejudice. There was evidence to support the first-degree murder charge and the evidence offered at trial would all have been admissible and relevant even if the second-degree charge had been the highest one given. There is no miscarriage of justice that requires correction; no major division among jurisdiction on the narrow question presented; and no critical question of constitutional law on which guidance need be given.

The State of Iowa urges that the Petition for Writ of Certiorari be dismissed.

———o———

CONCLUSION

No specific grounds which would require or justify review by certiorari in this Court have been alleged or shown.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

Hoover State Office Building
Des Moines, Iowa 50318

THOMAS D. McGRANE
Assistant Attorney General

Attorneys for Respondent